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Supreme Court, U.S.
FILED

No. 001563 APR 9 2001

OFFICE OF THE CLERK

In the
Supreme Court of the United States

Beverly California Corp.,
Petitioner,

v.

National Labor Relations Board,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board is authorized by Section 10(c) of the National Labor Relations Act to impose cease and desist and affirmative action orders upon work locations that have never committed unfair labor practices and are not otherwise involved in the underlying proceedings, simply because violations have been found at other work locations owned or operated by the same employer.

2. Whether a Court of Appeals can impose a word limitation on briefs that is so stringent that it effectively deprives an employer of its statutory right, under Section 10(f) of the National Labor Relations Act, to obtain judicial review of a National Labor Relations Board Decision and Order, and whether the same conduct also constitutes a denial of due process.

PARTIES TO THE PROCEEDINGS

Petitioner

The Petitioner in this case is Beverly California Corporation, which is a subsidiary of Beverly Enterprises, Inc. Beverly Enterprises, Inc. is traded publicly on the New York Stock Exchange. Petitioner is not related to any other publicly held or publicly-traded companies.

The only other party to appear and present argument in the Court of Appeals was the Service Employee International Union ("SEIU"), AFL-CIO, and Districts 1199P and 1199II, SEIU, AFL-CIO. The United Food and Commercial Workers Union, AFL-CIO entered an appearance in the Court of Appeals but was subsequently dismissed from the proceeding prior to argument.

Respondent

Respondent is the National Labor Relations Board ("NLRB").

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DECISIONS BELOW

The proceedings below are officially reported as follows:

1. Beverly California Corp. v. National Labor Relations Board, 227 F.3d 817 (7th Cir. 2000). The Decision is reproduced in the Appendix at App. A.

2. Beverly California Corp., 326 NLRB 153 (1998). The Decision is reproduced in the Appendix at App. F.

3. Beverly California Corp., 326 NLRB 232 (1998). The Decision is reproduced in the Appendix at App. G.

4. The Court of Appeals May 11, 1999 Order regarding page limitations is unreported and is reproduced in the Appendix at App. D.

5. The Court of Appeals May 19, 1999 Order denying Petitioner's Motion for Leave To File a Motion For Reconsideration is unreported and is reproduced in the Appendix at App. E.

6. The Court of Appeals January 8, 2001 Order denying Petitioner's Motion for Panel Rehearing is unreported and is reproduced in the Appendix at App. B.

7. The Court of Appeals March 23, 2001 Judgement is unreported and is reproduced in the Appendix at App. C.

A related prior case is reproduced in relevant part in the Appendix at App. M. That case is Torrington Extend-A-Care Employee Assn. v. NLRB, 17 F.3d 580 (2d Cir. 1994)

denying enforcement in relevant part to Beverly California Corp., 310 NLRB 222 (1993).

JURISDICTION

On August 21, 1998, the National Labor Relations Board ("Board") simultaneously issued two decisions and orders, Beverly California Corp., 326 NLRB 153 (1998) and Beverly California Corp., 326 NLRB 232 (1998). Petitions seeking review of these two decisions and orders were consolidated in the United States Court of Appeals for the Seventh Circuit. The Court of Appeals issued its decision on September 13, 2000 and denied a petition for rehearing on January 8, 2001. This Court has jurisdiction to issue a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the Constitution is reproduced in the Appendix at App. O.

The full text of Section 10(c) of the National Labor Relations Act is reproduced in the Appendix at App. O. In relevant part, it provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action

> including reinstatement of employees with or without backpay, as will effectuate the policies of this Act... [29 U.S.C. § 160(c)]

Section 10(f) of the National Labor Relations Act provides in full:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with

> respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. [29 U.S.C. § 160(f)]

Section 702 of the Administrative Procedures Act [5 U.S.C. § 702] is reproduced in the Appendix at App. O.

Section 706 of the Administrative Procedures Act is reproduced in the Appendix at App O.

28 U.S.C. §§ 2072(a) and (b) provide:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

STATEMENT OF THE CASE

A. Background Of Prior Litigation

Beverly California Corporation ("Beverly") operates 895 nursing homes nationwide (App. G at 440a). The present cases are a consolidation of the second and third in a series of administrative proceedings initiated by the Board against Beverly. The procedural history of the first such proceeding, Beverly California Corp., 310 NLRB 222 (1993) ("Beverly I"), is material to the present consolidated cases. In Beverly I, the Board's General Counsel accumulated all unfair labor practice charges that were filed nationally against Beverly nursing homes between 1986 and 1988 and then issued a consolidated complaint against 33 nursing homes. The General Counsel then asked the Board to use the unfair labor practice allegations relating to those 33 nursing homes as the basis for issuing a cease and desist order and other affirmative relief covering all 985 then-existing nursing homes nationwide. The Board found that certain violations occurred, and it issued an order requiring all 985 Beverly nursing homes to cease and desist from the conduct that had occurred at the underlying 33 nursing homes. The Board further ordered all 985 nursing homes to post a notice informing employees as to what had occurred at the 33 nursing homes and assuring employees that no similar conduct would occur again.

The Court of Appeals for the Second Circuit declined to enforce these nationwide provisions of the Board's Order, sub nom. Torrington Extend-A-Care Employees Association v. NLRB, 17 F.3d 580, 586 (2d Cir. 1994) (App. M). The court concluded that "violations at 3% of a company's facilities does not show an anti-union animus amounting to a proclivity to violate the Act", particularly where "most employment actions were handled at the facility level and never rose above the division level." Id.; App. M at 624a.

The court concluded that Beverly's corporatewide labor policy was lawful and that "[b]y and large, the presence of divisional personnel in union campaigns at individual facilities appears to have had a positive effect, and Beverly should not be punished merely because isolated unfair labor practices occurred when division personnel were present." Id. at 586-87; App. M at 625a. The case was remanded to the Board, and the Board then developed separate orders for each nursing homes, fully remedying the alleged unfair labor practices. Beverly California Corp., 316 NLRB 888 (1995).

B. The Underlying NLRB Proceedings

The present case stems directly from the aftermath of the Beverly I decision and constitutes the Board's General Counsel's second and third effort to obtain the same nationwide relief that was rejected by the Second Circuit. The first Board Decision at issue here is Beverly California Corp., 326 NLRB 153 (1998) ("Beverly II") (App. F). As it did in Beverly I, and over Beverly's strong objection, the Board's General Counsel accumulated all unfair labor practice charges that were filed nationally against Beverly nursing homes from 1988 through 1991 and then issued a consolidated complaint against 21 nursing homes. The General Counsel again sought a cease and desist order and other relief that would extend to all of Beverly's then-existing 895 nursing homes nationwide rather than the actual 21 nursing homes where unfair labor practices allegedly occurred. On June 29, 1994, an administrative law judge issued a decision finding that 17 of the 21 nursing homes had committed a total of 48 unfair labor practices, and the judge recommended the issuance of a cease and desist order and notice-posting requirement applicable to all 895 nursing homes because "it is my obligation to follow applicable Board precedent even when there exists a conflict

with U.S. Circuit Courts of Appeal." (App. F at 392a). Beverly filed exceptions to the recommended decision.

Meanwhile, from 1991 through 1993, the General Counsel continued its practice of accumulating charges against Beverly facilities, and it issued another consolidated complaint against 11 nursing homes. This proceeding became Beverly California Corp., 326 NLRB 232 (1998) ("Beverly III") (App. G). On June 12, 1995, an administrative law judge found that nine of the 11 nursing homes had committed a total of 28 unfair labor practices, and he recommended the same corporatewide cease and desist order and notice-posting requirement. Beverly again filed exceptions.

On August 21, 1998, the Board simultaneously issued decisions in Beverly II and Beverly III, substantially adopting each ALJ's unfair labor practice findings. The Beverly II Decision did not grant the nationwide order sought by the General Counsel. Instead, like the earlier Beverly I Decision on Remand, 316 NLRB 888, the Board crafted separate orders for each nursing home tailored to address only the unfair labor practices that occurred at those homes.

In its Beverly III decision, however, the Board concluded that the combined unfair labor practice findings in Beverly I, Beverly II and Beverly III warranted the same nationwide cease and desist order and notice-posting at all 895 Beverly nursing homes that the Court of Appeals for the Second Circuit earlier rejected (App. G at 427a).

C. Proceedings In The Court Of Appeals

Section 10(f) of the NLRA authorizes aggrieved parties to seek review of Board decisions and orders in the courts of appeals. 29 U.S.C. § 160(f). Beverly and various unions immediately filed petitions in various circuits to review each of the Board's decisions. These petitions eventually were transferred to the Court of Appeals for the Seventh Circuit

and consolidated into a single proceeding, since the Order issued in Beverly III was based in part on the unfair labor practice findings in Beverly II.

Beverly petitioned the Court of Appeals to review 42 specific unfair labor practice findings from the two Decisions in addition to the Board's unprecedented nationwide order. Federal Rule of Appellate Procedure ("F.R.App.P.") 32(a)(7) limits the length of briefs in ordinary cases to 14,000 words. Seventh Circuit Local Rule 28(d)(1)(B) permits a party to file a motion for "enlargement of the number of pages when the norm established by this rule proves inappropriate." Beverly's Counsel refined its Brief to the minimum text necessary to present facts and argument on the 42 alleged unfair labor practices and the corporatewide order, and Beverly then filed a motion to enlarge the word limitation by 272% to 52,604 words. The Honorable Diane P. Wood, Circuit Judge, denied Beverly's request and permitted Beverly only to file a Brief consisting of 19,600 words - - a 40% increase (App. D).

Although F.R.App.P. 27(c) states that the "court may review the action of a single judge", Judge Wood ruled that the "court will not entertain a motion to reconsider this order", and she subsequently denied Beverly's Motion For Leave To File A Motion For Reconsideration And Request For En Banc Consideration Of The Motion Or Alternatively Three-Judge Panel Review (App. E). Beverly then filed a brief complying with the word limitation.

On September 13, 2000, Judge Wood authored a decision that declined to enforce three of the Board's unfair labor practice findings - - including the only unfair labor practice allegation at Beverly's Wyoming Valley facility - - but enforced the remainder of the Board's findings and conclusions (App. A). The court then held that the National Labor Relations Act authorized the Board to extend the terms of its Order beyond the 25 nursing homes where unfair labor practices were found to have occurred. The court remanded

Beverly III to the Board with instructions to make ministerial changes in the language of the nationwide order, but the court ruled that the Board was entitled to impose nationwide relief. (App. A at 49a). The court denied a petition for rehearing on January 8, 2001.

ARGUMENT

THE PAGE LIMITATION IMPOSED BY JUDGE WOOD DEPRIVED BEVERLY OF ITS STATUTORY RIGHT TO MEANINGFUL APPELLATE REVIEW AND CONSTITUTED A DENIAL OF DUE PROCESS.

This case presents an important issue necessitating this Court's exercise of its supervisory authority over the courts of appeals in order to prevent a Federal Rule of Appellate Procedure from being used in a manner that deprives a party of its statutory and Constitutional right to obtain appellate review of an agency order. Beverly fully recognizes that this Court will be extremely reluctant to intervene in a discretionary court of appeals issue such as the word limitation for a brief. Beverly also recognizes the importance of concise presentation of facts and argument, as well as the constraints that federal appellate judges face in processing an increasing number of cases through an overworked federal court system. However, there is a point at which judicial expediency can deprive a party of substantive rights that are guaranteed by federal statutes and the Constitution, and Beverly's situation plainly is such a case.

Through Section 10(f) of the NLRA, Congress specifically grants aggrieved persons, like Beverly, the legal right to obtain court of appeals review of any orders issued by

the Board.[1] This statute obligates the reviewing court to set aside findings of fact and conclusions of law that are not supported by substantial evidence. It also requires the reviewing court to set aside a Board Order that exceeds the agency's statutory authority.[2] Like most courts of appeals, the Seventh Circuit specifically requires a petitioner's brief to set forth all relevant facts and arguments for each portion of the Board's Decision that the petitioner seeks to challenge upon review, and failure to do so constitutes a waiver of the right to seek review of those issues. Simkunas v. Tardi, 930 F.2d 1287, 1292 (7th Cir. 1991). See also, Massachusetts Bay Ins. Co. v. Vic Koenig Leasing, Inc., 136 F.2d 1116, 1122 (7th Cir. 1998) (the court of appeals has no obligation to consider an issue "that is merely raised, but not developed, in a party's brief").

A tension is created, however, when an administrative agency case is massive in size. A party like Beverly is legally entitled to obtain review of each finding of fact and conclusion of law that serves as a basis for the agency's order, and a party cannot be denied this right of review simply because of the size of the case. This is particularly true in a case like this one where the litigation strategy of Board's General Counsel has purposefully inflated the size of the proceeding by consolidating unrelated cases, and the Board itself has purposefully inflated the size of the proceeding both by issuing the Beverly II and Beverly III decisions simultaneously and by linking the order in one case to the facts of the other case.

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[1] The same right is guaranteed under the Administrative Procedures Act, 5 U.S.C. §§ 702, 706.

[2] Similarly see 5 U.S.C. § 706.

Unique cases of this extraordinary size do not fit neatly within the procedures that the courts of appeals use for processing ordinary cases. Those procedures are set forth in the Federal Rules of Appellate Procedure ("F.R.App.P."). F.R.App.P. 32 establishes a 14,000 word limitation for briefs filed in ordinary cases. Local rules - - like the Seventh Circuit's Rule 28(d)(1)(B) - - give the appellate courts discretion to enlarge the word limitation if the established norms "prove inappropriate".

Under no circumstances, however, may a procedural rule such as a word limitation, be applied in a manner that abridges a party's substantive statutory and Constitutional rights. In 28 U.S.C. § 2072, Congress granted the Supreme Court "the power to prescribe general rules of practice and procedure" in the United States courts of appeals, but Section 2072(b) specifically provides, in relevant part: "(s)uch rules shall not abridge, enlarge or modify any substantive right."

The same principle applies to local rules developed by federal courts under the authority of 28 U.S.C. § 2071. See, Frazier v. Beebe, 482 U.S. 641, 645-646, 107 S.Ct. 2607, 2611 (1987). Furthermore, it is this Court's obligation to exercise its supervisory authority to prevent a federal court from using the federal rules of appellate procedure as a mechanism to deprive a party of its statutory right to meaningful appellate review. See, Frazier v. Beebe, supra. See also, Logan v. Zimmerman Brush Co., 455 U.S. 422, 430, n. 5, 102 S.Ct. 1148, 1154, n. 5 (1982) (emphasizing the "basic importance" of being given "a meaningful opportunity to be heard"); Boddie v. Connecticut, 401 U.S. 371,377, 379, 91 S.Ct. 780, 785, 786 (1971) (imposing filing fee upon indigents effectively denies them "a meaningful opportunity to be heard").

The 19,600 word limitation imposed by Judge Wood was a clear abuse of discretion because it operated to deprive Beverly of the meaningful opportunity to obtain review of the

two orders issued by the Board in these consolidated cases. The size of the two underlying proceedings is simply monstrous. According to the Board's own estimates, the underlying records for the combined Beverly II and Beverly III cases consist of more than 14,000 transcript pages and more than 4,000 exhibits.[3]

The unprecedented size of this proceeding was a direct result of the litigation strategy employed by the Board's General Counsel. Previously, if the General Counsel believed an unfair labor practice had occurred in a Beverly nursing home, the General Counsel treated Beverly like any other employer and brought an action against that nursing home individually.[4] But commencing with Beverly I and continuing through Beverly II, the General Counsel consolidated cases in an effort to show the scope of the alleged misconduct. In Beverly II, the General Counsel consolidated 21 cases that ordinarily would have been heard and decided separately by the Board. The cases did not involve any common factual obligations - - meaning that there is not a single instance in which the conduct of a manager at one facility impacted employees at another facility, nor is there any instance in which conduct at one facility became known to employees at another facility. The only link between these unrelated cases is that Beverly or one of its subsidiaries owned or operated each of the 21 nursing homes (App. F). The General Counsel

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[3] (App. J, K). One of these documents contains a typographical error and says "100 exhibits" when the actual number is "1,000 exhibits." (App. J at 607a).

[4] E.g., Provincial House Living Center, 287 NLRB 158 (1987); Fountainview Place, 281 NLRB 26 (1986); Parkview Gardens Care Center, 280 NLRB 47 (1986); Leisure Lodge, 279 NLRB 327 (1986); Cumberland Nursing Center, 263 NLRB 428 (1982).

used the same approach in Beverly III, consolidating 11 separate cases involving no common factual allegations other than ownership (App. G).

In recognition of the prejudicial effect that its General Counsel's unique consolidation approach had on Beverly, the Board in Beverly II waived its own generally applicable 50-page limitation on briefs and granted Beverly up to 300 pages for initial briefing (App. H). The Board subsequently did the same in Beverly III, again granting Beverly 300 pages for initial briefing (App. I). The necessity of these page enlargements was confirmed when the Board issued its decisions in the two cases and the decisions totaled 140 pages in length.

In its petition for review, Beverly sought to challenge 42 separate unfair labor practice findings that were made by the Board in Beverly II and Beverly III. Not a single one of these challenges was based on the credibility of witnesses. Each challenge involved an issue of law or what Beverly firmly believed to be a lack of substantial supporting record evidence. Indeed, despite the inadequate opportunity for briefing, the Court of Appeals set aside three of the Board's unfair labor practice findings (App. A at 15a-24a) and expressed skepticism regarding at least 10 others before uncritically deferring to the Board's view of the evidence.[5]

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[5] "(W)e agree with Beverly that this is a close point" (App. A at 22a). "Merely to say that there was another way of looking at the evidence cannot carry the day for Beverly (App. A at 30a); "[w]e are thus not persuaded that the finding must be overturned" (App. A at 32a); "the Board's conclusion that a violation had occurred did not go beyond the boundaries of that evidence" (Id.); "[t]his was a permissible inference from the evidence" (App. A at 35a); "inferences drawn from specific facts can go either way, and thus . . . we must defer to the Board" (App. A at 36a); "[o]nce again, the fact that this incident can be seen in

There is an excellent chance that, if Beverly had been permitted to fully brief these unfair labor practice allegations, a large number of these "close call" allegations would have been set aside because, with ample briefing space, Beverly could have demonstrated that the "substantial evidence" to which the court deferred was inaccurate or was not contained within the record. **Because of Judge Woods's word limitation, Beverly was forced to brief 42 separate and unrelated unfair labor practice findings within less than 25 pages of text, with generally only one paragraph per allegation.** A different ruling by the court of appeals on these remaining unfair labor practice findings may well have changed the court's view of the Board's nationwide order.

Not only is this 19,600 word limitation a deprivation of Beverly's statutory rights under Section 10(f) of the NLRA, it also constitutes a deprivation of Beverly's due process rights under the Fifth Amendment. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." Logan v. Zimmerman Brush Co., supra, 455 U.S. at 429, 102 S.Ct. at 1154. The Court has also repeatedly held that the Fifth Amendment's Due Process Clause imposes "constitutional limitations upon the power of courts, **even in aid of their own valid processes** to dismiss an action without affording a party the opportunity

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a more innocuous light is not enough to win the day for Beverly" (App. A at 38a); "we cannot say that the Board's inferences were unreasonable" (App. A at 39a); "[t]here was enough evidence here from which the Board could infer a violation" (App. A at 41a); "[w]hile we see this as a close call, close calls go to the Board under the applicable standard of review" (App. A at 44a); "[o]nce again, given the deferential nature of substantial evidence review, we see no reason to reverse this finding" (App. A at 46a).

for a hearing on the merits of his cause." Societe Internationale v. Rogers, 357 U.S. 197, 209, 78 S.Ct. 1087, 1094 (1958) (emphasis added) (reversing dismissal for failure to fully comply with a pretrial production order); Logan v. Zimmerman Brush Co., supra, 455 U.S. at 429, 432, 102 S.Ct. at 1154, 1156 (once the legislature confers a property interest, such as access to an administrative agency's adjudicatory procedures, deprivation of that property interest must be analyzed in constitutional terms). Needless to say, a word limitation that precludes a party from raising facts and arguments is tantamount to a dismissal of an action.

Lastly, it is clear that the deprivation of Beverly's property interest occurred as a result of federal government action. The executive branch acted through the Board by consolidating 32 cases that ordinarily would have proceeded separately through the Board's administrative procedure. If the Board had not done this, each case could have proceeded separately to the applicable court of appeals for review, and Beverly would have had ample opportunity to present facts and arguments supporting each individual petition. The judicial branch acted through Judge Wood's imposition of a word limitation that was utterly inadequate for briefing each of the issues that Beverly sought to raise upon review. While there is no doubt that word limitations promote legitimate judicial interests, courts cannot use "their own valid processes" to deny substantive due process rights. Logan v. Zimmerman Brush Co., supra; 28 U.S.C. § 2072(b). The present case is the ideal vehicle for establishing this critical point through the exercise of this Court's inherent supervisory authority over the federal courts. Accordingly, a petition for writ certiorari should issue on this basis alone.

THE NLRA DOES NOT AUTHORIZE THE BOARD TO EXTEND THE REMEDIAL PROVISIONS OF ITS

ORDERS BEYOND WHAT IS NECESSARY TO REMEDY THE SPECIFIC UNFAIR LABOR PRACTICES FOUND BY THE BOARD.

This Court consistently has stated that the scope of the orders that can be issued by the Board is a matter "of importance in the administration of the National Labor Relations Act".[6] The proper resolution of this issue impacts all employers in the United States that operate from multiple locations because the Board is seeking to establish that it has the authority to impose orders at all of an employer's locations based on unfair labor practices accumulated at only 6% of the employer's locations over the course of a 6-year period.

The limits on the Board's remedial authority are set forth in Section 10(c) of the NLRA. Section 10(c) permits the Board to issue orders requiring a person who has committed an unfair labor practice to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]." 29 U.S.C. § 160(c). As this Court has previously held:

> Under 10(c), the Board's authority to remedy unfair labor practices is expressly limited by the requirement that its orders "effectuate the policies of the [Act]." Although this rather

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[6] NLRB v. Express Publishing Co., 312 U.S. 426, 431, 61 S.Ct. 693, 697 (1941); NLRB v. District 50, United Mineworkers of America, 355 U.S. 453, 458, 78 S.Ct. 386, 389, (1958), May Department Stores, Co. v. NLRB, 326 U.S. 376, 378, 66 S.Ct. 203,206 (1945).

> vague statutory command obviously permits the Board discretion, **at a minimum it encompasses the requirement that a proposed remedy be tailored to the unfair labor practice it is intended to redress.**

Sure-Tan, Inc. v. NLRB, 467 U.S. 883,900, 104 S.Ct. 2803, 2813 (1984) (emphasis added).

For this reason, the Board's chosen remedy must be "sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." Id., 467 U.S. at 900, 104 S.Ct. at 2813. The Board does not have the statutory authority to use its remedial power as a punitive measure against employers or unions who have committed unfair labor practices, even if the Board believes that the policies of the NLRA might be effectuated by such an order. Consolidated Edison Co. of New York Inc. v. NLRB, 305 U.S. 197, 236, 59 S.Ct. 206, 220 (1938); Local 60, United Brotherhood of Carpenters and Jointers of America, AFL-CIO v. NLRB, 365 U.S. 651,655, 81 S.Ct. 875,877-78 (1961).

The present case is particularly well-suited for review by this Court because the nationwide provisions of the Board's Order contain both a "cease and desist" requirement and an "affirmative action" requirement. These are the two general categories of relief that the Board is authorized to order under Section 10(c). The present Order's cease and desist requirement subjects all Beverly nursing homes to the risk of future contempt proceedings, including the more than 800 nursing homes where no unfair labor practices have ever occurred. The "affirmative action" requirement would force mandatory notice-posting at all 895 Beverly nursing homes even through violation occurred at only 25 of those homes.

Both types of orders are inappropriate for use on a nationwide basis because they do substantially more than what

is necessary to remedy the consequences of the unfair labor practices in these cases and do more than is necessary to dissipate the effects of the unfair labor practices. As such, they are punitive and not remedial. This case presents a unique opportunity for this Court to clarify the statutory limitations upon the Board's remedial authority regarding both cease and desist order and orders requiring affirmative action. The applicable frameworks for analyzing each form of order are discussed below.

A. The Board's Authority To Order Affirmative Action Is Limited To Expunging The Effects Of Unfair Labor Practices.

This Court first addressed the Board's authority to order affirmative action in Consolidated Edison Co., supra, 305 U.S. at 235-236, 59 S.Ct. at 219-20. The Board there had ordered an employer to disavow certain labor contracts the employer had executed with certain unions even though the Board made no finding that the employer had unlawfully assisted the unions in any way. The contracts had been negotiated during a timeframe when unfair labor practices had occurred, and the Board sought to use the "affirmative action" language of Section 10(c) to force the employer to invalidate the contracts. This Court held that the Board's actions exceeded its remedial authority under Section 10(c).

> We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order. The power to

> command affirmative action is remedial, not punitive, and needs to be exercised in aid of the Board's authority to restrain violations as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.

Id.

In numerous subsequent cases, this Court has repeatedly emphasized that the NLRA does not grant the Board authority to issue "affirmative action" orders that exceed what is necessary to undo the effects of particular unfair labor practice violations. See, Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 539, 63 S.Ct. 1214, 1218 (1983) (the Board's authority is to expunge "the effects of unfair labor practices"); NLRB v. The 7-Up Bottling Company of Miami, Inc., 344 U.S. 344, 346, 73 S.Ct. 287, 289 (1953) (Board must fashion "remedies to undo the effects of violations of the Act"); NLRB v. District 50, United Mineworkers of America, supra, 355 U.S. at 456, 78 S.Ct. at 389 (the Board exceeded its "discretionary power under 10(c), 29 U.S.C. § 160(c), to fashion remedies to dissipate the effects of an employer's unfair labor practices in assisting a union.").

This Court has further held that, when crafting any affirmative action remedy, the Board must focus on "the victims of discrimination", and the Board may only order the steps necessary to remedy "the consequences of a violation". Local 60, United Brotherhood of Carpenters and Jointers of America, AFL-CIO v. NLRB, supra, 365 U.S. at 655, 81 S.Ct. at 877, (setting aside Board order requiring reimbursement of union dues). The Board's Order must then be "tailored to the unfair labor practice it is intended to

redress" and "must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." Sure-Tan, Inc. v. NLRB, supra, 467 U.S. 883,900, 104 S.Ct. at 2813.

The nationwide notice-posting requirement ordered by the Board here is not "tailored" in any respect. A notice-posting requirement is generally designed for two groups of employees: (1) the "victims of discrimination"; and (2) other employees who are aware of the unfair labor practices and who need to be informed of the remedial measures so that the unfair labor practices do not discourage them from exercising their NLRA rights. Clearhaven Nursing Home, 236 NLRB 853, 854 n. 5 (1978). A notice certainly is appropriate for employees at the location where unfair labor practices occurred since those employees are presumptively aware of what happened and should be advised that their legal rights will be protected. No remedial purpose is served, however, by notifying employees at Beverly's other 870 nursing homes about unfair labor practices that occurred at 25 nursing homes, when the employees at those 870 nursing homes are not aware of the unfair labor practices and have been neither impacted nor coerced by those unfair labor practices.

The "victims of discrimination" in each of the underlying cases are uniformly located at the nursing homes where the particular unfair labor practices involving them occurred. The Board's decision does not claim - - nor is there any record evidence to suggest - - that employees at one nursing home learned about unfair labor practices at another nursing home. This distinguishes Beverly's situation from those rare cases in which the Board chose to extend its notice-posting requirement to an employer's other locations because knowledge of the unfair labor practices at one location had chilled the exercise of employees Section 7 rights at another

location.[7] Absent such knowledge, no remedial purpose is served by extending an order to locations where no unfair labor practices occurred. The Court of Appeals for the Second Circuit recognized this in Beverly I.

> "With regard to whether employees at other Beverly sites knew of the unfair labor practices in question and would be chilled by them, there simply is no evidence to support such a conclusion. Beverly operates 985 nursing homes, and nothing in the record suggests that employees at other locations had any knowledge of, much less were chilled by, the unfair labor practices. There was no evidence that Beverly's line employees were transferred from facility to facility or that other means of communications spread information about such events."

Beverly I, 17 F.3d at 587 (internal citation omitted).

The Court of Appeals for the Seventh Circuit completely overlooked or ignored this issue in its decision.

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[7] United Aircraft Corp. v. NLRB, 440 F.2d 85, 100 (2d Cir. 1971) (requiring notice-posting at an employer's six Connecticut plants that "all are located in a limited and compact area", where unfair labor practices occurred in five of those six plants); NLRB v. Delchamps, Inc., 653 F.2d 225, 228-229 (5th Cir. 1981) (enforcing a notice-posting requirement at 17 employer-operated stores in the Mobile, Alabama Metropolitan area because the stores were part of the same single bargaining unit and there was regular intermingling of employees). In neither of these cases did the Board extend the terms of the cease and desist order beyond the locations at which unfair labor practices occurred.

The court acknowledged that the scope of the notice-posting was an issue raised by Beverly (App. A at 4a), but the court, then uncritically treated the affirmative action relief as part and parcel of the cease and desist relief and enforced both portions of the Board's Order. A writ of certiorari would allow this Court to expound upon the distinction between "affirmative action" relief and "cease and desist" relief in the unprecedented context of a nationwide remedial order.

B. The Board Exceeded Its Statutory Authority By Issuing A Cease And Desist Order On A Nationwide Basis.

Many employers in the United States have operations in more than one location. If unfair labor practices occur at one of the employer's locations, the Board typically issues a cease and desist order covering that employer location, but the Board does not extend the Order to other employer locations where no unfair labor practices occurred (see footnote 4, supra). The Board's Order in Beverly III extends cease and desist provisions to uninvolved employer locations simply because those locations are owned or operated by the same employer. The Board justifies this Order by relying upon the conduct of various non-corporate Beverly representatives and by pointing to the numerical percentage of nursing homes where unfair labor practices occurred. Whether the Board has the statutory authority to adopt this approach is of paramount importance to all employers who have business operations in more than one location.

This case is the proper vehicle for Supreme Court review of this issue because the record here is fully developed and contains substantial record evidence demonstrating that the unfair labor practices in these cases are location-specific and do not involve conduct or policies that extend beyond the location where the specific unfair labor practices occurred. If

the Board is permitted to proceed with its new approach to cease and desist relief, a nursing home that has never committed an unfair labor practice and has never been the subject of an unfair labor practice complaint could find itself in a federal court of appeals defending a contempt action based on the nationwide cease and desist order issued by the Board in this case.

This Court first addressed the scope of the Board's "cease and desist" remedial authority in NLRB v. Express Publishing Co., supra, 312 U.S. 426, 61 S.Ct. 693. The employer there had unlawfully refused to bargain with its union. The Board ordered the employer to cease and desist from refusing to bargain with the union. The Board then went further and broadly ordered the employer to refrain from violating the Act in any manner whatsoever. The Court found that the Board had overstepped its authority because "the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct." Id., 312 U.S. at 433, 61 S.Ct. at 698. The Court particularly expressed concern that "Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found." Id., 312 U.S. at 435, 61 S.Ct. at 699.

This Court expressed a similar concern about illegitimate exposure to the broad power of contempt proceedings in May Department Stores Co. v. NLRB, supra, 326 U.S. at 388-390, 66 S.Ct. at 210-212. In that case, the Board found that the employer had refused to bargain in good faith with its union and had interfered with its employees' rights. Rather than issue a cease and desist order tailored to

enjoin these types of practices in the future, the Board broadly ordered the employer to cease and desist from violating the NLRA in any other manner. The Court modified the Board's order and tailored the order to apply only to the actual violations found by the Board. Id., 326 U.S. at 392-393, 66 S.Ct. at 215. In reaching this decision, the Court established the standard for reviewing cease and desist orders issued by the Board.

> The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an Order was necessary to prevent the employer before it "from engaging in any unfair labor practice affecting commerce." Section 10(a). *** We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation .... 'To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or the danger of their commission in the future is to be anticipated from the course of his conduct in the past.'

Id., quoting from NLRB v. Express Publishing Co., supra, 312 U.S. at 437, 61 S.Ct. at 700.

There is no doubt whatsoever that the Board can fully remedy each of the unfair labor practices that the Board found to have occurred in Beverly III without extending the Board's order beyond the location where unfair labor practices occurred. Prior to this consolidated litigation, the Board

routinely issued orders limited in scope to the particular facility at which an unfair labor practice allegedly occurred (see footnote 4, supra). These orders included appropriate cease-and desist provisions, notice-posting requirements at the applicable nursing home and other affirmative action such as reinstatement, backpay, or expungement of unlawful warnings from personnel files. Similarly, when the Board lost its effort to obtain a corporatewide order in Beverly I, the Board fully remedied the various unfair labor practices at the involved nursing homes with facility-specific orders of the same type that it had historically employed. Beverly California Corporation, supra, 316 NLRB 888. In its Beverly II order, the Board once again issued facility-specific orders that adequately and completely expunged all consequences of the unfair labor practices, and these orders have been enforced (App. C). The Board could readily accomplish the same with respect to the remaining 28 unfair labor practices at the nine nursing homes that are part of the Beverly III case.

The present case is different from cases in which an employer commits a single unfair labor practice that impacts employees at multiple locations, thereby warranting a cease and desist order that covers more than one location. For example, if an employer has a handbook that contains an overly broad rule that restricts an employee's ability to exercise NLRA rights, and if the handbook is distributed to employees at multiple locations, the effects of the unfair labor practice can only be expunged through a cease and desist order and notice-posting applicable at each location where employees have been impacted by the unfair labor practice. E.g., Service Merchandise Co., Inc., 299 NLRB 1125 (1990). In the present case, however, no unfair labor practice had an impact beyond the nursing home where the unfair labor practice occurred, and the Board did not find otherwise.

Similarly, in a series of cases involving an employer named J.P. Stevens & Co., Inc.,[8] the courts of appeals enforced numerous Board orders and ultimately even entered contempt findings against the employer for violating court orders. Eventually, the courts enforced Board orders which extended remedial relief beyond the locations at which unfair labor practices occurred. In each case, however, the courts did so because the Board's evidence established a "company-wide policy", J.P. Stevens & Co., Inc. v. NLRB, 623 F.2d 322, 327 (4th Cir. 1980) in which top level corporate officials personally committed unfair labor practices and then orchestrated a series of speeches at other company locations through which it sought a "to chill the ardor of employees for the Union by gloating about the Union's utter lack of progress at the organized plants, a lack of progress found here to be attributable to a resolve to defy the statute." J.P. Stevens & Co., 239 NLRB 738, 771 (1978), enf'd 623 F.2d 322 (4th Cir. 1980). See also, J.P. Stevens & Co., Inc. v. NLRB, 668 F.2d 767, 773 (4th Cir. 1982) ("high-ranking officials of [the Company] acted deliberately and with a directness of purpose in contravening unmistakable statutory guarantees and the spirit of the contempt order to frustrate the employee choice during that campaign.").

The Board's evidence in the present case does not come remotely close to establishing any unlawful company policy applicable to all nursing homes operated by Beverly. The record here shows that Beverly has a lawful written policy in place regarding its position on unionization (App. N), and the Board did not find this written policy to be

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[8] The litany of J.P. Stevens cases is best described in NLRB v. J.P. Stevens & Co., Inc., 563 F.2d 8, 13 (2d Cir. 1977).

unlawful.[9] Unlike the employer in the J.P. Stevens line of cases, Beverly has routinely worked well with a number of unions and has in place more than 100 labor contracts covering approximately 10% of its nursing homes (App. A at 47a). Beverly never took unlawful conduct at one location and boasted about it at another location in an effort to chill union organizing activity.

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[9] On the contrary, the Board found Beverly's written policy to be lawful but found that "the lawfulness of such a general policy does not insulate an employer" from findings that its conduct has gone beyond the limits of its stated policy. (App. G at 428a). The only other portion of the Board's two decisions that mentions Beverly's written policy is the Administrative Law Judge's decision in Beverly II (App. F at 391a). The Board found it unnecessary to address the Judge's findings of fact regarding the written policy since the Board did not issue a nationwide order in Beverly II. Moreover, the Judge did not find the written policy to be unlawful. Nonetheless, he misquoted from the policy in his decision and omitted material language in a manner that misrepresents the content of the policy. For example, while the policy states that "the Company policy is to **foster** a pro-associate relationship in a non-union environment whenever possible" (App. N), the Judge quoted the policy as being to "force" a pro-associate relationship in a non-union environment whenever possible. Forcing would be unlawful, where as fostering is lawful. The Judge also conveniently omitted the next two critical sentences of the policy which state: "In those facilities where the associates have elected union representation, management will establish and promote a sound business relationship with the union. All labor relations policies, procedures and practices shall be in compliance with all Federal and State Labor Laws and Regulations" (App. N). The Judge similarly omitted an important sentence stating that if facility's responsibility was to "promote a sound business relationship with the union where a bargaining unit is certified." (Id.). The Board properly ignored the Judge's mischaracterization of record evidence.

Moreover, no corporate official committed an unfair labor practice other than the single incident in which the Board found that Director of Associate Relations Roger Brown wrongfully suspended an employee. That employee had, by her own admission, interrupted a management meeting six times to voice her pro-union sentiments (App. L), even though she had been told that questions were not permitted at the meeting and even after she was warned that further interruptions may lead to suspension (Id.). Brown's isolated conduct in this one meeting cannot, standing alone, serve as the basis for finding the existence of a "company-wide policy" to commit unfair labor practices. C.f., Dayton Bd. of Education v. Blindman, 433 U.S. 406, 420, 97 S.Ct. 2766, 2775 (1997) ("only if there has been a systemwide impact can there be a systemwide remedy"); Lewis v. Casey, 518 U.S. 343, 359-360, 116 S.Ct. 2174, 2184 (1996) (same).

The critical point in the J.P. Stevens line of cases is that the Board's order needed to be extended to other locations because the record showed that employees at those other locations knew about the unfair labor practices that were occurring elsewhere and because those unfair labor practices were indisputably discouraging those employees from exercising their rights under the NLRA. There is no such evidence in the present case, and extending the cease and desist and notice-posting provisions to nursing homes where no unfair labor practices have ever occurred plainly exceeds what is necessary to dissipate the effects of the existing unfair labor practices.

Boiled down to its essence, the evidentiary basis for the Board's Order hinges almost entirely upon the numerical percentage of nursing homes at which unfair labor practices have occurred. The Beverly I litigation involved 33 facilities over a three-year time span, and the Court of Appeals for the Second Circuit correctly found that the problems at 3% of Beverly's then-existing nursing homes did not justify

imposing remedial provisions at the 97% of nursing homes where no unlawful conduct had occurred. The Beverly II proceeding added 16 homes[10] over the course of the next three years, and the Beverly III proceeding included 9 more homes over the succeeding two years. Even when all three cases are combined, the number of nursing homes involved in this aggregated litigation represent only 6% of Beverly's nursing homes over a six year period. This average of 1% per year, while not ideal, is not unexplained since even the Board acknowledges that: (1) Beverly was "the subject of substantial efforts at organizing its employees by various unions" (App. G at 593a) during that timeframe as part of a corporate campaign by the unions; and (2) the General Counsel stockpiled every allegation against Beverly during this timeframe while refusing to allow the settlement of any charge (Id.).

The unfair labor practices from Beverly I have been fully and adequately remedied. 316 NLRB 888. The same is tree for the unfair labor practices in Beverly II (App. C). A nationwide order is not necessary in order to fully remedy the remaining unfair labor practices found by the Board in Beverly III. The obvious purpose of a nationwide order is to punish Beverly by putting uninvolved nursing homes at risk of future contempt proceedings, and this purpose exceeds the Board's statutory authority under Section 10(c).

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[10] While the Board originally found violations at 16 homes, the Court of Appeals dismissed all allegations involving Wyoming Valley (App. A at 19a-21a).

CONCLUSION

The writ requested should issue because: (1) the word limitation imposed by Judge Wood raises an important issue implicating this Court's supervisory authority over the Court of Appeals; and (2) the Board's corporate-wide cease and desist order and notice-posting requirement raises an important issue regarding the administration of the NLRA and the scope of the Board's remedial authority under Section 10(c).

Respectfully submitted,

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Dated: April 6, 2001